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NOTES

Whose Malice Counts?: *Kolstad* and the Limits of Vicarious Liability for Title VII Punitive Damages

Title VII of the Civil Rights Act of 1964[1] provides several remedies for individuals subjected to intentional employment discrimination based on race, color, religion, sex, or national origin.[2] The statute originally granted only equitable relief, including injunction, reinstatement, initial hiring, back pay, and other related remedies.[3] In 1991, however, Congress recognized that equitable relief alone was not achieving Title VII's goals of preventing workplace discrimination and providing relief for victims of discrimination.[4] Therefore, as part of the Civil Rights Act of 1991,[5]

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1. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

2. *See id.* § 2000e-5(g)(1); *id.* § 1981a(a)(1) (1994). Employers may not discriminate in their decisions about hiring and firing, compensation, formation and maintenance of the work environment, creation of privileges, or classification and training. *See id.* § 2000e-2(a)(1)–(2), (d). An employer may, however, discriminate on the basis of a protected characteristic if the characteristic is a bona fide occupational qualification that satisfies a legitimate business necessity. *See id.* § 2000e-2(e). Also, employers owned or supported by a religious institution may hire only persons affiliated with that particular institution. *See id.* Title VII expressly excludes the U.S. government from its definition of "employer." *See id.* § 2000e(b). Similarly, persons or entities who employ fewer than fifteen employees each day for twenty or more working weeks in a year are also excluded from coverage. *See id.*

3. *See id.* § 2000e-5(g)(1). These remedies apply to instances of intentional discrimination against specific individuals, often termed "disparate treatment." *See id.* (stating that such relief is available "[i]f the court finds that the respondent has intentionally engaged or is intentionally engaging in an unlawful employment practice"); Beverly Bryan Swallows, *Reducing Legal Risk and Avoiding Employment Discrimination Claims*, FRANCHISE L.J., Summer 1999, at 9, 10 (explaining that, in order to recover under the disparate treatment theory, plaintiffs must prove that the employer intended to discriminate on the basis of a protected characteristic). Title VII also protects against employment practices that disadvantage groups of employees based on protected characteristics. *See* 42 U.S.C. § 2000e-2(k); Griggs v. Duke Power Co., 401 U.S. 424, 429–30, 436 (1971) (holding that Title VII was clearly designed "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees"). Causes of action based on these practices do not require intent to discriminate and are commonly referred to as "disparate impact" cases. *See* Judith J. Johnson, *A Standard for Punitive Damages Under Title VII*, 46 FLA. L. REV. 521, 524–25 (1994). This Note deals only with cases of disparate treatment.

4. *See* H.R. REP. NO. 102-40, pt. 1, at 64 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 602 (acknowledging that the original remedies did not adequately relieve discrimination

Congress permitted courts to award compensatory and punitive damages to victims of intentional discrimination under Title VII.[6] Congress acknowledged that many victims of employment discrimination suffered harms that could not be relieved by equitable remedies alone[7] and also agreed that compensatory and punitive damages were necessary to deter intentional discrimination in the workplace and to enforce Title VII's prohibitions.[8] The new damages were intended, therefore, to provide greater relief under Title VII and to boost Title VII's enforcement by preventing violations and encouraging plaintiffs to take action.[9]

Like the original equitable remedies, compensatory damages are available once the plaintiff proves intent to discriminate.[10] However, Congress has imposed a higher burden of proof on plaintiffs who seek

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victims nor provide employers with "incentives to prevent intentional discrimination in the workplace before it happens"); *see also* Michael W. Roskiewicz, Note, *Title VII Remedies: Lifting the Statutory Caps from the Civil Rights Act of 1991 to Achieve Equal Remedies for Employment Discrimination*, 43 WASH. U. J. URB. & CONTEMP. L. 391, 394–401 (1993) (providing a useful summary of the legislators' motivations for permitting compensatory and punitive damages).

5. 42 U.S.C. § 1981a.

6. *See id.* § 1981a(a)(1). Compensatory damages are intended to provide relief for the types of harm—such as humiliation and pain and suffering—that are not covered by equitable remedies. *See Compensatory and Punitive Damages*, Fair Empl. Prac. Man. (BNA) No. 876, at 431:336 (July 1999) [hereinafter *Damages*]. Punitive damages do not remedy actual harm; instead, they punish employers and deter them from committing further acts of willful discrimination. *See id.* These awards are capped. *See* 42 U.S.C. § 1981a(b)(3). The caps range between $50,000 and $300,000 depending on the size of the employer. *See id.* § 1981a(b)(3)(A)–(D).

7. *See* H.R. REP. NO. 102-40, pt. 1, at 66–69, 1991 U.S.C.C.A.N. at 604–07 (providing anecdotal examples of discrimination victims undercompensated by Title VII's original remedial scheme); H.R. REP. NO. 102-40, pt. 2, at 25 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 718 ("Victims of discrimination often suffer substantial out-of-pocket expenses as a result of . . . discrimination, none of which is compensable with equitable remedies."); Johnson, *supra* note 3, at 527 (noting that, before compensatory and punitive damages were allowed, a plaintiff whose harms were not covered by equitable remedies would "be afforded no relief even if she prevailed"); *see also* Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701 (Nov. 21, 1991) (stating that a main goal of the new legislation was to create "meaningful monetary remedies").

8. *See* H.R. REP. NO. 102-40, pt. 1, at 69, 1991 U.S.C.C.A.N. at 607 (stating that the additional damages would deter future discrimination in the general employer community).

9. *See id.* at 70, 1991 U.S.C.C.A.N. at 608 ("[P]ermitting the recovery of such damages would enhance the effectiveness of Title VII by making victims of intentional discrimination whole for their losses, by deterring future acts of discrimination, and by encouraging private enforcement."). Congress was also motivated to permit compensatory and punitive damages by its desire to put Title VII on par with 42 U.S.C. § 1983 (1994), which has permitted such damages for intentional discrimination on the basis of race. *See* H.R. REP. NO. 102-40, pt. 1, at 64–66, 1991 U.S.C.C.A.N. at 602–04.

10. *See* 42 U.S.C. § 1981a(a)(1).

punitive damages.[11] To receive punitive damages, the plaintiff must show not only intent, but also "malice" or "reckless indifference to [the plaintiff's] federally protected rights."[12]

Whether plaintiffs seek equitable relief, compensatory damages, punitive damages, or all three, employers alone typically bear the burden of each of these Title VII remedies, even though their individual employees commit the discriminatory acts that cause the harm.[13] For example, employers are liable for awards of punitive damages, although the required "malice" or "reckless indifference" usually derives from a supervisor or other person acting on the employer's behalf.[14] In this way, employers discriminate vicariously, and when they are liable, they are liable vicariously.[15]

Vicarious liability is, however, essential to Title VII's goals of compensation and deterrence. Because recovery from the offenders themselves is at best impractical and at worst impossible,[16] employers

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11. *See id.* § 1981a(b)(1).

12. *Id.*; *see also infra* notes 105–10 and accompanying text (explaining the United States Supreme Court's interpretation of § 1981a(b)(1)).

13. *See* LAURA W. STEIN, SEXUAL HARASSMENT IN AMERICA: A DOCUMENTARY HISTORY at xxiii-xxiv (1999) (stating, in the context of discriminatory harassment, that the employer pays damages more frequently than the perpetrator); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 604 (1988) (stating that Title VII victims must sue employers in order to recover damages); Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509, 510 (1996) ("[E]ven when discrimination is the product of an individual supervisor's discriminatory animus ... the employer nonetheless shoulders responsibility for the discrimination.").

14. *See* Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title XI*, 7 WM. & MARY BILL RTS. J. 755, 759 (1999) ("[T]he entity-defendant is not a living person and it does not act except through the living persons who work for it."); Jan W. Henkel, *Discrimination by Supervisors: Personal Liability Under Federal Employment Discrimination Statutes*, 49 FLA. L. REV. 767, 768 (1997) ("[A] company only can act through its employees ...."); White, *supra* note 13, at 518–19 (explaining that, while the bulk of discrimination is done by individuals, the liability for their actions falls on their employers).

15. *See* Sykes, *supra* note 13, at 563 (" 'Vicarious liability' may be defined as the imposition of liability upon one party for a wrong committed by another party. One of its most common forms is the imposition of liability on an employer for the wrong of an employee or agent."); *see also* Rebecca Hanner White, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725, 727 n.10 (1999) ("As applied in the employment context, [vicarious liability] would hold an employer liable for the acts of its employees.").

16. Federal courts have almost universally held that employees are not individually liable for discrimination under Title VII. *See* Henkel, *supra* note 14, at 768 & n.3 (citing relevant circuit court decisions). The Ninth Circuit Court of Appeals, for example, has asserted that it is "inconceivable that Congress intended to allow civil liability to run against individual employees." Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir.

must be held responsible for *all* damages arising from unlawful discrimination.[17] Recently, however, in *Kolstad v. American Dental Association*,[18] the United States Supreme Court examined vicarious liability for Title VII punitive damages and limited the range of employees whose "malice" or "reckless indifference" can be imputed to the employer.[19] The *Kolstad* Court also provided a safe harbor from punitive damages for employers acting in good faith.[20]

Title VII's text does not expressly foreclose vicarious liability for prohibited types of intentional discrimination.[21] The statute simply prohibits "employers" from discriminating[22] and defines "employer" to include employers' "agents."[23] When Title VII was drafted, Congress contemplated that the statute would apply to the kinds of employment decisions that legislators believed were the natural responsibility of employers,[24] including hiring, firing, promotion, demotion, and creation of pay scales.[25] Courts have reflected the legislators' intent by uniformly holding employers liable when their employees engage in these traditionally recognized types of discrimination.[26]

1993). Moreover, even if they could be held individually liable, most employees would not have the funds to pay the judgments against them. *See* Henkel, *supra* note 14, at 768 (noting that if victims had recourse only to the wrongdoers themselves, they would gain little meaningful relief); White, *supra* note 13, at 543 ("[M]ost individuals do not have the assets to satisfy such awards.").

17. *See* Henkel, *supra* note 14, at 768 (asserting that without vicarious liability, employers would have less incentive to prevent workplace discrimination); *see also* Maria M. Carrillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41, 89 (1992–93) (asserting that vicarious liability is fair because employers are in the best position to regulate the actions of the individuals they employ); White, *supra* note 13, at 562 (noting that the continued application of vicarious liability is essential if Title VII is to remain effective).

18. 119 S. Ct. 2118 (1999).

19. *See id.* at 2128–29; *infra* notes 111–20 and accompanying text.

20. 119 S. Ct. at 2129; *infra* notes 121–28 and accompanying text.

21. *See* Carrillo, *supra* note 17, at 53 (noting the statute's lack of guidance on the limits of employer liability); Fisk & Chemerinsky, *supra* note 14, at 762 ("[T]he statute does not address vicarious liability.").

22. 42 U.S.C. § 2000e-2(a) (1994).

23. *Id.* § 2000e(b) (1994).

24. *See* Fisk & Chemerinsky, *supra* note 14, at 762 (asserting that the types of employment decisions the legislators had in mind would be "attributable to the employer under any theory of agency"). These forms of discrimination typically result in "tangible employment actions." *See infra* notes 159–61 and accompanying text.

25. *See* Fisk & Chemerinsky, *supra* note 14, at 762 (noting the basic types of job practices upon which Congress based the 1964 Act).

26. For sources making this observation, see *infra* notes 163–65 and accompanying text.

The idea of limiting vicarious liability did not arise until courts, in the 1970s, began to recognize harassment as a type of intentional discrimination under Title VII.[27] Courts acknowledged that harassment is actionable not only when it results in an economic or "tangible" harm, but also when it causes a "hostile environment" within the victim's workplace.[28] However, because a wrongdoer can create a "hostile environment" even without the ability to hire, fire, demote, or promote the victim,[29] many courts have been reluctant to apply vicarious liability to hostile environment harassment as consistently as they have applied it to the more traditionally recognized forms of discrimination.[30] In 1986, the Supreme Court

27. *See* Fisk & Chemerinsky, *supra* note 14, at 758 (noting that, before harassment was actionable, courts adhered to a strict employer liability standard)). *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd and remanded on other grounds sub nom* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978), was the first case in which a federal court recognized the sexual harassment cause of action. *See* FRANCIS ACHAMPONG, WORKPLACE SEXUAL HARASSMENT LAW 17, 30 n.4 (1999). The Equal Employment Opportunity Commission (EEOC) officially recognized sexual harassment as a form of gender discrimination in 1980 and soon thereafter issued regulations defining unlawful sexual harassment. *See* MARGARET C. JASPER, EMPLOYMENT DISCRIMINATION LAW UNDER TITLE VII 25 (1999). In 1983, the Fourth Circuit declared that "[s]exual harassment erects barriers to participation in the work force of the sort Congress intended to sweep away by the enactment of Title VII." Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983) (citing Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981)).

28. *See, e.g.*, *Katz*, 709 F.2d at 254–55 (acknowledging that unlawful sexual harassment includes harassment that causes an offensive work environment); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (holding that a "hostile or offensive atmosphere created by sexual harassment" violates Title VII). The Supreme Court validated causes of action for both types of sexual harassment in 1986. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 64–66 (1986). Within her examination of women's managerial employment roles in the United States, Ann Harriman provides a brief yet useful summary of the progression of the sexual harassment cause of action through the federal courts and enforcement agencies both before and after *Meritor*. *See* ANN HARRIMAN, WOMEN/MEN/MANAGEMENT 59–64 (2d ed. 1996).

29. Professor White explains that "hostile work environment claims, from the outset of their recognition, have raised questions about vicarious liability. Because hostile work environment claims do not involve the granting or withholding of a job benefit or detriment, co-workers, as well as supervisors, can create a hostile working environment." White, *supra* note 13, at 523.

30. *See, e.g.*, Karibian v. Columbia Univ., 14 F.3d 773, 779 (2d Cir. 1994) (acknowledging that courts were unsure of the proper basis for holding employers liable for hostile environment harassment); Kauffman v. Allied Signal, Inc., 970 F.2d 178, 184 (6th Cir. 1992) (noting that courts had applied different liability standards to hostile environment cases than to other intentional discrimination cases); *see also* Fisk & Chemerinsky, *supra* note 14, at 758 (noting that the sexual harassment cause of action "led some courts to conclude that employers should not be held automatically liable for workplace discrimination"); White, *supra* note 13, at 523–24 (describing courts' reluctance to impose vicarious liability for harassment that does not cause a tangible employment action).

validated this reluctance in *Meritor Savings Bank v. Vinson*[31] by holding that common-law agency principles can limit employer vicarious liability for Title VII sexual harassment claims.[32]

In the wake of *Meritor*, some courts weakened Title VII vicarious liability still further by using agency principles to limit punitive damages awards in Title VII cases generally.[33] Showing reluctance to "punish" employers for their employees' states of mind, these courts found that employers were responsible for other remedies, but not liable for punitive damages.[34] Just before endorsing this trend in *Kolstad*, the Supreme Court issued two opinions further articulating the limits it had suggested in *Meritor*:[35] *Burlington Industries v. Ellerth*[36] and *Faragher v. City of Boca Raton*.[37] Neither case dealt explicitly with punitive damages, but their reasoning proved crucial to the Court's decision to limit vicarious liability for punitive damages in *Kolstad*.

This Note explores the effects of the *Kolstad* holding on employer liability[38] and asserts that *Kolstad* will prevent appropriate punitive damage awards in cases in which courts are unwilling to

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31. 477 U.S. 57 (1986).

32. *See id.* at 72.

33. *See, e.g.*, Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 944 (5th Cir. 1996) (refusing to hold an employer liable for punitive damages because the offender was only a manager, not a "corporate officer"); Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 810 (5th Cir. 1996) (noting that agency law does not support imposing punitive damages liability on an employer for the acts of a supervisory employee); Reynolds v. CSX Transp., Inc., 115 F.3d 860, 869 (11th Cir. 1997), (holding that the wrongdoer must be a member of upper management in order to impute punitive damages to the employer), *judgment vacated on other grounds*, 524 U.S. 947 (1998); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1323 (11th Cir. 1999) (refusing to allow punitive damages because the employees who wrongfully demoted the plaintiff, while managers, were not "high enough up Wal-Mart's corporate hierarchy").
see also Fisk & Chemerinsky, *supra* note 14, at 762–63 (stating that some courts have required that the bias derive from high-level company officials).

34. *See, e.g.*, *Dudley*, 166 F.3d at 1323 ("Although an employer may be liable in compensatory damages for the discriminating act of its agent, the employer might not be liable for punitive damages for the same act."); *see also* Judith J. Johnson, *A Uniform Standard for Exemplary Damages in Employment Discrimination Cases*, 33 U. RICH. L. REV. 41, 79 (1999) ("Several courts . . . have refused to impute punitive damages to the employer for a supervisor's reckless indifference.").

35. *See infra* notes 63–67 and accompanying text (noting the circuit court conflicts that led to the Court's decision to hear *Ellerth* and *Faragher*).

36. 524 U.S. 742 (1998).

37. 524 U.S. 775 (1998).

38. This Note analyzes only that portion of *Kolstad* dealing with an employer's vicarious liability for punitive damages. The first portion of the Court's opinion discussed the meaning of " 'malice or . . . reckless indifference to federally protected rights.' " 119 S. Ct. at 2124–26 (quoting 42 U.S.C. § 1981a(b)(1) (1994)). The text accompanying notes 105–10 briefly explains the Court's interpretation of this statutory language.

interpret *Kolstad* with a view toward Title VII's enforcement goals.[39] The Note begins by describing the background law provided by *Meritor*, *Ellerth*, and *Faragher*.[40] It then briefly recounts the facts of *Kolstad* and its history in the lower courts[41] and details the Supreme Court's holding on the issue of employer liability.[42] To demonstrate its thesis, the Note first shows that Title VII's text does not support the Court's requirement that a wrongdoer be an agent in a "managerial capacity."[43] It then suggests an interpretation of "managerial capacity" that would more frequently permit appropriate punitive damages awards.[44] Next, the Note challenges the policy behind the Court's creation of a "good-faith efforts" defense to punitive damage liability[45] and urges courts to construe "good-faith efforts" as narrowly as possible in order to fulfill the enforcement goals of punitive damages.[46]

In addressing the vicarious liability question in *Kolstad*, the Court relied on three of its earlier Title VII decisions: *Meritor Savings Bank v. Vinson*,[47] *Burlington Industries v. Ellerth*,[48] and *Faragher v. City of Boca Raton*.[49] Although these three cases did not address Title VII punitive damages, their discussions of agency principles and Title VII policy provided a foundation for the Court's reasoning in *Kolstad*. The *Kolstad* Court used the principles introduced in *Meritor* and applied in *Ellerth* and *Faragher* when it restricted vicarious liability for punitive damages.[50]

The Supreme Court first examined the idea of limiting vicarious liability under Title VII in *Meritor*.[51] The case involved a female bank

39. *See infra* notes 129–235 and accompanying text.
40. *See infra* notes 47–85 and accompanying text.
41. *See infra* notes 88–104 and accompanying text.
42. *See infra* notes 111–28 and accompanying text.
43. *See infra* notes 134–43 and accompanying text.
44. *See infra* notes 144–97 and accompanying text.
45. *See infra* notes 207–23 and accompanying text.
46. *See infra* notes 224–32 and accompanying text.
47. 477 U.S. 57 (1986).
48. 524 U.S. 742 (1998).
49. 524 U.S. 775 (1998).
50. *See infra* notes 115–16 and accompanying text.
51. *See* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 122 (1995) (stating that *Meritor* provided the Supreme Court with the first chance to examine the issue of limiting vicarious liability under Title VII); Justin P. Smith, Note, *Letting the Master Answer: Employer Liability for Sexual Harassment in the Workplace After* Faragher *and* Burlington Industries, 74 N.Y.U. L. REV. 1786, 1787 (1999) (same). Then-Justice Rehnquist delivered the majority opinion in *Meritor*, which was joined by Chief Justice Burger and Justices White, Powell, Stevens, and O'Connor.

employee's Title VII action against her employer for damages arising from sexual harassment by her supervisor.[52] After holding that harassment by a supervisor that results in a "hostile work environment" is actionable discrimination under Title VII,[53] the Court questioned whether the employer is always vicariously liable for a hostile environment created by its employees.[54] Although the Court concluded that some limitations on this type of employer liability are proper,[55] it decided not to address these limitations in detail.[56] Nevertheless, the Court specifically held that the court of appeals erred in disregarding agency principles and in finding the employer absolutely liable for the supervisor's harassing behavior without regard to the specifics of the situation.[57]

The *Meritor* Court noted that Title VII defined an "employer" to include that employer's "agents."[58] It then stated that this definition reflected Congress's intent that common-law "agency principles" guide courts in determining employer vicarious liability.[59] More specifically, the Court stated that such a definition "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."[60] The Court warned, however, that common-law agency principles, as important as they are, may not conform to every contour of Title VII.[61] Even though the Court's treatment in *Meritor* of vicarious liability in hostile environment situations was limited, its holding eventually formed the background for future decisions on Title VII vicarious liability.[62]

For over a decade, federal courts struggled with the proper application of *Meritor*'s brief treatment of vicarious liability for

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See Meritor, 477 U.S. at 58.

52. *See Meritor*, 477 U.S. at 60. The plaintiff alleged that she at first tolerated her supervisor's sexual advances because she was afraid of losing her job and that she failed to report the harassment because she was afraid of her supervisor. *See id.* at 60–61.

53. *See id.* at 64–67.

54. *See id.* at 69–73.

55. *See id.* at 72.

56. *See id.* ("We ... decline the parties' invitation to issue a definitive rule on employer liability."); *see also* White, *supra* note 15, at 727 (noting that the Court's explanation was vague and left many questions unanswered).

57. *See Meritor*, 477 U.S. at 73.

58. *See id.* at 72.

59. *Id.*

60. *Id.*

61. *See id.* ("[C]ommon law principles may not be transferable in all their particulars to Title VII.").

62. *See infra* note 75 and accompanying text (citing the Court's recognition of *Meritor*'s importance).

hostile environment harassment.[63] Serious disagreement developed during this time among the circuit courts of appeals over the proper use of agency principles in the Title VII context.[64] In 1998, the Supreme Court responded to the confusion by issuing two opinions that state a definitive standard for vicarious liability for sexual harassment by supervisors.[65] In both *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, the Court held that employers are subject to strict vicarious liability for harassment by their supervisors that results in tangible employment actions, such as firing or demotion.[66] Employers are also vicariously liable for harassment that creates a hostile environment, but they may assert a complete defense to liability if they demonstrate that they took prompt measures to correct harassment and that the plaintiff did not properly avoid the harm.[67]

In *Ellerth*, the plaintiff alleged that she quit her sales job after fifteen months because she could no longer tolerate being sexually

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63. *See* William R. Corbett, Faragher, Ellerth, *and the Federal Law of Vicarious Liability for Sexual Harassment by Supervisors: Something Lost, Something Gained, and Something to Guard Against*, 7 WM. & MARY BILL RTS. J. 801, 808–09 (1999) (describing the sharp division over the standard for employer liability).

64. While most courts held that harassment resulting in hiring, firing, or other "tangible" actions invoked employer liability, *see, e.g.*, Davis v. Sioux City, 115 F.3d 1365, 1367–68 (8th Cir. 1997) (stating that such actions are imputed automatically to the employer), they were uncertain as to whether to hold employers liable when the harassment only created a threat of such action, *see, e.g.*, Gary v. Long, 59 F.3d 1391, 1396–98 (D.C. Cir. 1995) (holding that an employer could be insulated from liability). Almost every aspect of this confusion was reflected in the eight separate opinions produced by the Seventh Circuit in *Jansen v. Packaging Corp. of America*, 123 F.3d 490 (7th Cir. 1997), which came before the Supreme Court as *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998). *See* Corbett, *supra* note 63, at 809.

65. *See Faragher*, 524 U.S. 775, 807 (1998) (acknowledging that the Court was adopting the same holding it formulated in *Ellerth*); *Ellerth*, 524 U.S. at 754 (concluding that "a uniform and predictable standard must be established as a matter of federal law").

66. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765; *see also infra* notes 156–58 and accompanying text (discussing tangible employment actions).

67. *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Justice Kennedy wrote the opinion for the *Ellerth* Court and was joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, and Breyer. *See Ellerth*, 524 U.S. at 746. Justice Ginsburg wrote an opinion concurring in the judgment. *See id.* at 766 (Ginsburg, J., concurring in the judgment). Justice Thomas, joined by Justice Scalia, issued a dissenting opinion in which he asserted that an employer should only be liable for hostile environment harassment upon a showing of the employer's own negligence. *See id.* at 766–74 (Thomas, J., dissenting).

Justice Souter wrote the majority opinion in *Faragher*, which was joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, Kennedy, Ginsburg, and Breyer. *See Faragher*, 524 U.S. at 779. Justice Thomas, joined by Justice Scalia, dissented for the reasons he stated in *Ellerth*—an employer should not be liable for a supervisor's harassing behavior unless the employer itself is negligent. *See id.* at 810 (Thomas, J., dissenting).

harassed by her supervisor.[68] Her supervisor was not a company policymaker, but he was a manager and was authorized to make decisions, subject to his own supervisor's approval, about hirings and promotions.[69] In *Faragher*, the plaintiff, a city lifeguard, likewise claimed that sexual harassment by her two supervisors had created a hostile work environment.[70] Faragher's first harasser was a department chief who could hire new lifeguards, supervise all aspects of their duties, counsel and reprimand them, and make records of disciplinary actions against them.[71] Her second harasser was the training captain to whom she reported.[72] The training captain was responsible for creating her daily assignments and for supervising her work and training.[73] In addressing the relationships among the plaintiffs, their harassers, and their employers, the Court in both cases specifically sought to outline what *Meritor* had declined to delineate—the circumstances under which an employer is vicariously liable for hostile environment sexual harassment committed by its supervisory employees.[74]

The Court in *Ellerth* and *Faragher* first bound itself to *Meritor*'s assertion that courts should turn to common-law agency principles when deciding whether or not vicarious liability applies.[75] Because *Meritor* had cited the Restatement (Second) of Agency as a source of common-law agency principles, the Court in *Ellerth* and *Faragher* appealed directly to the Restatement as a useful place to begin the agency analysis.[76] Both opinions acknowledged that the Restatement permits vicarious liability when the employee's misdeed is in the "scope of employment," but concluded that sexual harassment is outside this scope.[77] The opinions noted, however, that the Restatement also permits liability for actions outside the scope of employment if the " '[servant] was aided in accomplishing the tort by the existence of the agency relation.' "[78] The Court then concluded

68. *See Ellerth*, 524 U.S. at 747.
69. *See id.*
70. *See Faragher*, 524 U.S. at 780.
71. *See id.* at 781.
72. *See id.*
73. *See id.*
74. *See Faragher*, 524 U.S. at 785–86; *Ellerth*, 524 U.S. at 746–47.
75. *Faragher*, 524 U.S. at 792; *Ellerth*, 524 U.S. at 754. *Faragher* further states that "*Meritor*'s statement of the law is the foundation on which we build today." *Faragher*, 524 U.S. at 792.
76. *Faragher*, 524 U.S. at 792; *Ellerth*, 524 U.S. at 755–56.
77. *See Faragher*, 524 U.S. at 799; *Ellerth*, 524 U.S. at 756.
78. *Faragher*, 524 U.S. at 801 (citing the RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958)); *Ellerth*, 524 U.S. at 758 (same). The Restatement provides three

that when an employee has succeeded in taking a tangible employment action against the harassment victim, such as firing, demotion, or a pay decrease, the "aided in the agency" relation is definitively established.[79] In other words, if an employee holds the authority to undertake tangible employment actions that affect other employees, he is an agent of the employer.[80]

The Court held in both cases that employers are also vicariously liable for sexual harassment that creates a hostile work environment, even though no tangible harm results.[81] Noting, however, that it was compelled to satisfy *Meritor*'s holding that agency principles limit vicarious liability, the Court created a safe harbor provision for employers in hostile environment cases.[82] The Court held that, when a supervisor's discrimination against an employee results in a tangible employment action, the employer is vicariously liable to the employee and may not defeat liability with an affirmative defense.[83] On the other hand, when a supervisor's discriminatory behavior creates only a hostile work environment, the employer is still vicariously liable, but may assert a two-part affirmative defense.[84] The employer must establish the following: (1) that the employer promptly used reasonable care to prevent and correct the wrongdoer's conduct; and (2) that the plaintiff employee unreasonably failed either to use any preventive or corrective opportunities the employer had provided or to otherwise curb the harm caused by the discriminatory conduct.[85]

Ellerth and *Faragher*, therefore, establish that Title VII requires absolute vicarious liability when the plaintiff's employment is tangibly harmed. Following *Meritor*'s instruction on agency principles, however, the Court limited vicarious liability for hostile environment harassment to situations in which the employer cannot prove its fault-

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other instances in which an employer ("master") may be liable for his or her employee's ("servant's") actions outside the scope of employment. Liability may be proper when "(a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master." RESTATEMENT (SECOND) OF AGENCY § 219(2)(a)–(c).

79. *See Faragher*, 524 U.S. at 791 (noting the soundness of court decisions equating agency with the ability to take tangible employment actions); *Ellerth*, 524 U.S. at 761 (same).

80. *See Ellerth*, 524 U.S. at 762–63 ("Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate.").

81. *See Faragher*, 524 U.S. at 802; *Ellerth*, 524 U.S. at 763–64.

82. *See Faragher*, 524 U.S. at 804; *Ellerth*, 524 U.S. at 763–64.

83. *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

84. *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

85. *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

based defense. As the following discussion of *Kolstad v. American Dental Association*[86] demonstrates, the Court is also willing to use agency principles to limit vicarious liability in contexts other than hostile environment harassment.

In *Kolstad*, the majority used these agency principles to place boundaries around vicarious liability for punitive damages.[87] Carole Kolstad was the Director of Federal Agency Relations for the American Dental Association ("Association") in its Washington, D.C., office.[88] In 1992, one of the Association's high-level legislative program directors announced his plan to retire, and Kolstad applied to fill the vacancy.[89] Tom Spangler, the Association's Legislative Counsel, was also vying for the prestigious position.[90] Leonard Wheat, head of the Washington office, had previously given both Kolstad and Spangler "distinguished" performance ratings.[91] Although Wheat had requested that Dr. William Allen, director of the Association's Chicago office, make the final hiring decision, Wheat recommended that Spangler be hired for the job.[92] Allen took Wheat's recommendation and selected Spangler.[93]

Alleging that the selection of Spangler was based on gender discrimination as prohibited by Title VII, Kolstad brought suit against the Association in the United States District Court for the District of Columbia.[94] She supported her contention by introducing evidence that Spangler, who had less experience with the Association and less experience with the type of work related to the vacant position, was pre-selected for the job in an effort to prevent a woman from filling it.[95] Kolstad showed that Wheat had been unwilling to meet with her about the job, that Allen altered the job description to match more closely Spangler's qualifications, and that Wheat had been heard

86. 119 S. Ct. 2118 (1999).
87. *Id.* at 2128–29.
88. *See id.* at 2122.
89. *See id.*
90. *See id.*
91. *See id.*
92. *See id.*
93. *See id.*
94. *See id.* As required, Kolstad first exhausted her remedies through the Equal Employment Opportunity Commission. *See id.*; *see also* U.S. Equal Opportunity Employment Commission, *Federal Laws Prohibiting Job Discrimination: Questions and Answers* (visited Feb. 29, 2000) <http://www.eeoc.gov/facts/qanda.html> (providing a concise overview of an employee's charge processing procedures through the EEOC).
95. *See* Kolstad v. American Dental Ass'n, 139 F.3d 958, 960–61 (D.C. Cir.) (en banc), *cert. granted*, 119 S. Ct. 401, *cert. denied*, 119 S. Ct. 408 (1998), *vacated*, 119 S. Ct. 2118 (1999).

making sexually offensive and derogatory remarks about prominent professional women.[96] The jury found that the Association had indeed violated Title VII by discriminating against Kolstad based on her gender and awarded her $52,718 of equitable relief in the form of back pay.[97] The district court, however, determined that Kolstad did not make the showing necessary to permit a jury instruction on punitive damages.[98]

Kolstad appealed the district court's decision not to instruct the jury on punitive damages,[99] but the Court of Appeals for the District of Columbia Circuit, sitting en banc, agreed that a punitive damages instruction would have been improper.[100] The court first made clear that the statute does not permit punitive damages if the plaintiff has shown nothing more than intent to discriminate.[101] The court then concluded that the standard for punitive damages requires the plaintiff to demonstrate that the employer engaged in "egregious discriminatory conduct."[102] Because the court of appeals determined that Kolstad had not met this threshold requirement,[103] it affirmed the district court's decision without explaining the requirement in detail.[104]

Noting the conflict among the circuits over the proper interpretation of the punitive damages statute,[105] the Supreme Court granted certiorari.[106] The Court rejected the District of Columbia

96. *See Kolstad*, 119 S. Ct. at 2122–23; *Kolstad*, 139 F.3d at 960–61.
97. *See Kolstad*, 119 S. Ct. at 2123; *Kolstad*, 139 F.3d at 961.
98. *See Kolstad*, 119 S. Ct. at 2123; *Kolstad*, 139 F.3d at 961.
99. *See Kolstad*, 119 S. Ct. at 2123.
100. *See id.*; *Kolstad*, 139 F.3d at 969–70.
101. *See Kolstad*, 139 F.3d at 963.
102. *Id.* at 969.
103. *See id.* at 965.
104. *See id.* at 970.
105. *See Kolstad*, 119 S. Ct. at 2123 ("We granted certiorari to resolve a conflict among the Federal Courts of Appeals concerning the circumstances under which a jury may consider a request for punitive damages under § 1981a(b)(1).") (citation omitted). The Fourth Circuit had previously indicated that punitive damages are reserved only for "egregious" cases of discrimination, *see* Harris v. L & L Wings, Inc., 132 F.3d 978, 982 (4th Cir. 1997), as had the Ninth Circuit, *see* Ngo v. Reno Hilton Resort Corp., 140 F.3d 1299, 1304 (9th Cir. 1998). Other circuits expressly rejected this approach as inconsistent with the plain language of the punitive damages statute. *See* Luciano v. Olsten Corp., 110 F.3d 210, 220 (2d Cir. 1997); *see also* Ortiz v. John O. Butler Co., 94 F.3d 1121, 1127 (1st Cir. 1996) (emphasizing the wrongdoer's state of mind); McKinnon v. Kwong Wah Restaurant, 83 F.3d 498, 508–09 (7th Cir. 1996) (noting that cultural and educational differences do not mitigate the defendants' offensive acts). The First Circuit had also recently held that a "jury need not find some special sort of malign purpose in order to exact punitive damages in a disparate treatment case." Dichner v. Liberty Travel, 141 F.3d 24, 33 (1st Cir. 1998).
106. *See Kolstad*, 119 S. Ct. at 2123.

Circuit's conclusion that malice or reckless indifference requires egregious conduct.[107] Instead, the Court held that the terms "malice" and "reckless" refer solely to the wrongdoer's state of mind, not to the severity of discrimination.[108] According to the majority, to demonstrate that discrimination was committed " 'with reckless indifference to [an employee's] federally protected rights,' " a plaintiff simply must show that the discrimination was committed with knowledge that it was or may have been unlawful.[109] The Court held that, while egregious or reprehensible acts of discrimination can provide compelling *evidence* of the necessary state of mind, they are not a *prerequisite* to sending the issue to a jury.[110]

The Court's opinion, however, did not end with its interpretation of the punitive damages statute. The majority stated that, beyond a showing of the requisite malice or reckless indifference, "[t]he plaintiff must impute liability for punitive damages to [the employer]."[111] This vicarious liability question, however, was not squarely presented to the Court in *Kolstad*.[112] The majority addressed the issue sua sponte, asserting that employer liability was "intimately

107. *See id.* at 2123–24.

108. *See id.*

109. *Id.* at 2124 (quoting 42 U.S.C. § 1981a(b)(1) (1994)). The Court identified a few situations in which a finding of the requisite knowledge would not be proper even where there was intent to discriminate. *See id.* at 2125. Among these were situations in which "the employer may simply be unaware of the relevant federal prohibition." *Id.* Whether the Court intended to sanction a "mistake of law" defense is uncertain, but the language does seem to permit an escape from punitive damage liability even where the employer *should have known* the discrimination was prohibited. One commentator anticipated this confusion and concluded that Congress surely did not intend to create such a loophole. She asserted that "[i]gnorance of the law has never been a defense in a Title VII case; however, Congress may have intended to allow some ignorance of the nuances of the law to be a defense in this regard." Johnson, *supra* note 34, at 65; *see also Kwong Wah*, 83 F.3d at 509 (holding that "[i]gnorance of the law or of local custom is not a defense under Section 1981a," but a "defendant's cultural background is not irrelevant in evaluating the appropriateness of punitive damages"). While this Note does not explore this problem, the exact meaning of the apparent "mistake of law" exception is likely to be an issue in future Title VII litigation.

The *Kolstad* Court noted that a finding of knowledge required for "reckless indifference" may also be improper when an employer has a distinct belief that the discrimination is permissible or has a reasonable belief that it falls into a statutory exception. *See Kolstad*, 119 S. Ct. at 2125. A "reckless indifference" finding may also be improper where the "underlying theory of discrimination may be novel or otherwise poorly recognized." *Id.*

110. *See Kolstad*, 119 S. Ct. at 2126.

111. *Id.*

112. *Id.* at 2132–33 (Stevens, J., concurring in part and dissenting in part) (noting that the parties had not briefed the issue and arguing that the facts of Kolstad's case did not raise it); *see also Damages*, *supra* note 6, at 431:338 (stating that the Court decided an issue that was not before it).

bound up with ... and ... subsumed within the question on which [the Court] granted certiorari."[113] The Court then proceeded to explore when an employer can be held liable for its employee's "malice" or "reckless indifference."[114]

Consistent with its approach in *Ellerth* and *Faragher*, the Court in *Kolstad* applied common-law agency principles to examine when it is proper to limit Title VII vicarious liability.[115] As it had done in these earlier cases, the Court recognized the Restatement (Second) of Agency as the best place to begin articulating the common law.[116] The Court noted that, although the Restatement strictly limits vicarious liability for punitive damages, the Restatement permits liability when " 'the agent was employed in a managerial capacity and was acting in the scope of employment.' "[117] The Court applied this provision to Title VII and determined that a "managerial capacity" finding is necessary to impute liability for punitive damages to an employer.[118] Instead of outlining what such a capacity entails, however, the Court advocated case-by-case analyses of each wrongdoer's role in the employer's operations.[119] The majority advised that each analysis of an employee's managerial capacity should look to the type of authority and amount of discretion the

113. *Kolstad*, 119 S. Ct. at 2127. Five Justices joined to form the majority in the vicarious liability portion of the Court's opinion. *See id.* at 2121. The four dissenters to this portion of *Kolstad*, rather than rejecting the majority's rationale or approach, simply argued that the Court should not have addressed the issue at all. *See id.* at 2132–33 (Stevens, J., concurring in part and dissenting in part). Writing for the dissent, Justice Stevens noted that "[i]t is not this Court's practice to consider arguments ... that were not presented in the brief in opposition to the petition for certiorari." *Id.* at 2133 (Stevens, J., concurring in part and dissenting in part). Justice Stevens was joined by Justices Souter, Ginsburg, and Breyer. *See id.* at 2121. This Note does not dispute that vicarious liability and the punitive damages provision are closely related, nor does it speculate about whether it was appropriate for the Court to address an issue not squarely before it. This Note does attempt, however, to articulate some problems created by the Court's reasoning and, in so doing, perhaps incidentally supports the dissent's call for restraint.

114. *See id.* at 2127.

115. *See id.* at 2127–28.

116. *See id.* at 2128.

117. *Id.* (quoting the RESTATEMENT (SECOND) OF AGENCY § 217C(c) (1957)). The Restatement also considers punitive damage liability proper when "(a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or ... (d) the principal or a managerial agent of the principal ratified or approved the act." RESTATEMENT (SECOND) OF AGENCY § 217C. The Court did not discuss these other three provisions as applicable to Title VII punitive damages liability. *See Kolstad*, 119 S. Ct. at 2128.

118. *See Kolstad*, 119 S. Ct. at 2128.

119. *See id.* ("[D]etermining whether an employee meets [the managerial] description requires a fact-intensive inquiry.").

employer has given to the offending employee.[120]

Despite adopting the "managerial capacity" portion of the Restatement's exception, the Court rejected the "scope of employment" portion.[121] The Court first explained that, in general, "scope of employment" may include acts that the employer has expressly forbidden; under common-law agency principles, then, discrimination on the basis of sex could be considered within this scope.[122] The Court was concerned, however, that if the "scope of employment" principle were to be transferred directly to Title VII, even employers who try diligently to comply with the statute's mandates would be liable for punitive damages due to discrimination by their managerial agents.[123] The majority found this type of absolute liability unacceptable for two reasons. First, the Justices argued that it conflicts with the common-law agency principle that states that it is " 'improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.' "[124] Second, they asserted that absolute liability conflicts with Title VII's goal of encouraging employers to implement measures to prevent and remedy discrimination.[125] Earlier in its opinion, the Court stated that, because punitive damages require an employer to have acted "with 'malice or with reckless indifference *to . . . federally protected rights*,' " the employer should not be liable for such damages if it did not know that its behavior was unlawful.[126] The Court was concerned that, without a safe harbor from punitive damages liability, employers might be tempted to avoid punitive damages by not educating themselves and their employees about Title VII's prohibitions.[127] To avoid these consequences and to square the common law with Title VII's purpose of encouraging employers to implement antidiscrimination measures, the Court held that "an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good faith efforts to comply with Title VII.' "[128]

120. *See id.*
121. *See id.* at 2129.
122. *See id.*
123. *See id.*
124. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 909 cmt. b (1965)).
125. *See id.*
126. *Id.* at 2124 (quoting 42 U.S.C. § 1981a(b)(1) (1994)).
127. *See id.* at 2129.
128. *Id.* (quoting Kolstad v. American Dental Ass'n, 139 F.3d 958, 974 (D.C. Cir.) (en banc) (Tatel, J., dissenting), *cert. granted*, 119 S. Ct. 401, *cert. denied*, 119 S. Ct. 408 (1998),

In sum, the vicarious liability portion of *Kolstad* held that even if the plaintiff establishes that her superior intentionally discriminated with "malice" or "reckless indifference" and that he was a "managerial agent" of the employer, she might not be awarded punitive damages. The employer can avoid liability if the evidence permits a finding that it made "good-faith efforts" to prevent unlawful discrimination among its managers and employees.

A main goal of the punitive damages provision is to help enforce Title VII by deterring unlawful conduct.[129] The limitations on liability established by *Kolstad* will undermine this purpose by creating the potential for employers to avoid punitive damages liability more often than Title VII's text and policy allow. The following analysis demonstrates this potential by showing that the "managerial capacity" limitation is unsupported by Title VII's text[130] and that the "good-faith efforts" defense is not sufficiently justified by the Title VII policy of employer self-education.[131] Lower courts can nevertheless reduce the impact of these limitations by interpreting and applying the new *Kolstad* framework to effectuate, as often as possible, the deterrent purpose of punitive damages. This analysis suggests a broad interpretation of "managerial capacity"[132] and urges a specific, narrow, and case-by-case examination of "good-faith efforts."[133]

Relying on *Meritor*'s statement that common-law principles limit Title VII vicarious liability, the *Kolstad* Court explicitly accepted the proposition that one who discriminates with "malice" or "reckless indifference" must be an agent in a managerial capacity before the employer can be liable for punitive damages.[134] A close look at Title VII's language, however, demonstrates that the "managerial capacity" limitation was not called for by the text of the punitive damages statute. Title VII's punitive damages provision creates its own express limitations on liability for punitive damages, and these limitations do not require reference to the Restatement language cited by the Court.[135] First, Title VII requires that the "respondent"

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vacated, 119 S. Ct. 2118 (1999)).

129. *See supra* notes 8–9 and accompanying text (citing the legislative history behind the 1991 Act).

130. *See infra* notes 134–43 and accompanying text.

131. *See infra* notes 207–23 and accompanying text.

132. *See infra* notes 144–97 and accompanying text.

133. *See infra* notes 224–32 and accompanying text.

134. *Kolstad*, 119 S. Ct. at 2128.

135. *Cf.* Fisk & Chemerinsky, *supra* note 14, at 783 (noting, similarly, that the Court overlooked important provisions of Title VII when, in *Ellerth* and *Faragher*, it chose to

intentionally discriminate "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[136] Punitive damage liability, therefore, is limited to situations in which the wrongdoer knew or suspected she was violating the law.[137] Second, Title VII explicitly states that the term "respondent" includes "employers,"[138] and that "employers" includes employers' "agents."[139] Therefore, *any* "agent" of an employer who discriminates with the requisite state of mind should subject the employer to liability.[140] The Court's insistence that the wrongdoer be not just an "agent," as expressed in the statute, but be an " 'agent ... employed in a managerial capacity,' " is unsolicited.[141] Title VII has defined the employer in express terms and has crafted a separate analysis for an employer's punitive damage liability.[142] It has not left open a gap to be filled by the "managerial capacity" language of the Restatement. There may indeed be some call for courts to use common-law agency principles to determine who qualifies as an "agent," but *Kolstad* has improperly rewritten the statutory language to require a special, more advanced degree of agency than the punitive damages statute requires.[143]

Nevertheless, the Court has imprinted the "managerial capacity" requirement on all future Title VII punitive damages analyses.[144] In explaining what must be shown in order to demonstrate that the wrongdoer was not just an agent, but an agent "employed in a managerial capacity," the Court held that each case requires a "fact-intensive inquiry."[145] The majority stated that such an inquiry reviews the type of authority and amount of discretion the employer has given the wrongdoer.[146] The Court also suggested that an employee must be " 'important,' " but that the employee does not need to be at the top of the employer's hierarchy to be acting in a managerial

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rely on *Meritor*'s vague use of agency principles).

136. 42 U.S.C. § 1981a(b)(1) (1994).

137. *See Kolstad*, 119 S. Ct. at 2125; *see also supra* note 109 and accompanying text (explaining the Court's holding and some of the qualifications of that holding).

138. 42 U.S.C. § 2000e(n) (1994).

139. *Id.* § 2000e(b).

140. *See id.* § 1981a(b)(1); *id.* § 2000e(b).

141. *Kolstad*, 119 S. Ct. at 2128–30 (quoting the RESTATEMENT (SECOND) OF AGENCY § 217 C(c) (1957)); 42 U.S.C. § 2000e(b).

142. *See* 42 U.S.C. § 2000e(b); *id.* § 1981a(b)(1).

143. *Kolstad*, 119 S. Ct. at 2128.

144. *See id.* at 2130.

145. *Id.* at 2128.

146. *See id.* at 2128.

capacity.[147] Ultimately, though, the Court stated that "managerial capacity" has not yet been well-defined,[148] and the Court itself declined to define it.[149]

If courts choose to define managerial capacity narrowly, they may exonerate employers even if the perpetrator truly wielded a great deal of the employer's authority.[150] If courts are to achieve the enforcement purposes of punitive damages, however, they must interpret "managerial capacity" broadly. This Note does not attempt to offer a comprehensive interpretation of managerial capacity, but it at least argues that, as a matter of law, wrongdoers with the authority to take tangible employment actions—such as firings, demotions, and pay decreases—against their victims are employed in a "managerial capacity."[151] To support this contention, this analysis discusses the original intent of Title VII and the reflection of this intent in the body of federal Title VII case law,[152] the intent of the 1991 Act,[153] a closely similar analysis in *Ellerth* and *Faragher*,[154] and the Solicitor General's oral argument before the *Kolstad* Court.[155]

An employment action is "tangible" when it significantly alters the employment status of the victimized employee.[156] The Supreme

147. *Id.* (quoting 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 4.4(B)(2)(a) (3d ed. 1995)).

148. *See id.* (citing 2 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 24.05 (1998)).

149. *See id.*

150. In Kolstad's situation, for instance, the court on remand may find that Wheat was not acting in a managerial capacity, even though he was the acting head of the entire office. *See id.* at 2122. Recently, the United States District Court for the District of South Carolina reached a similar conclusion in *Scott v. Ameritex Yarn*, 72 F. Supp. 2d 587 (D.S.C. 1999). Despite the fact that the wrongdoer was the supervisor of the entire plant in which the victim worked, *see id.* at 590, the court refused to find that the supervisor was employed in a managerial capacity, *see id.* at 597. The court therefore concluded that there was no basis, according to the *Kolstad* rationale, for imputing the supervisor's misconduct to the employer. *See id.* at 597–98.

151. This analysis does not in any way suggest that a finding of managerial capacity *requires* the employee's ability to take a tangible employment action, only that the ability to take a tangible employment action requires a finding of a managerial capacity. Indeed, punitive damages may also be vital to employees with non-tangible harms—their harms may be inflicted with an equal degree of "malice" or "reckless indifference." This analysis, however, is limited to arguing that tangible employment actions demonstrate managerial capacity *as a matter of law*.

152. *See infra* notes 159–65 and accompanying text.

153. *See infra* notes 166–78 and accompanying text.

154. *See infra* notes 179–89 and accompanying text.

155. *See infra* notes 190–97 and accompanying text.

156. *See* Burlington Industries v. Ellerth, 524 U.S. 742, 761 (1998); *Enforcement Guidance on Vicarious Employer Liability for Harassment by Supervisors*, EEOC Compl. Man. (BNA) N:4075, N:4078 (visited February 29, 2000) <http://www.eeoc.gov/docs/

Court has offered examples of tangible employment decisions, including "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or ... a significant change in benefits."[157] The Equal Employment Opportunity Commission (EEOC) maintains that tangible employment actions can also include any unwanted changes in job duties, even if pay and benefits are not reduced.[158]

Title VII was originally intended primarily to curb tangible employment actions—these were the basic types of harms the legislators contemplated when they enacted the statute.[159] Title VII's failure to address vicarious liability demonstrates that the legislature did not question the propriety of holding employers liable when these types of discrimination occurred.[160] As Professors Fisk and Chemerinsky note, Title VII does not address vicarious liability because Congress had only considered the kinds of discrimination that "would, without doubt, form the basis of employer liability."[161] In other words, if an employee is wrongfully fired from his job because he is Asian, male, or because he practices Judaism, there is no reason to examine whether the employer is liable; an employee with the authority to do the firing acts for the employer—effectively, she *is* the employer.[162]

Federal case law is consistent with this analysis. The courts have

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harassment.html> [hereinafter *Enforcement Guidance*].

157. *Ellerth*, 524 U.S. at 761; *see also Enforcement Guidance*, *supra* note 156, at N:4078 (listing hiring, firing, promotion, failure to promote, demotion, undesirable reassignment, significant benefit changes, changes in compensation, and work reassignment as tangible harms).

158. *See Enforcement Guidance*, *supra* note 156, at N:4078. The EEOC also expressly disagreed with the Fourth Circuit's contention in *Reinhold v. Virginia*, 151 F.3d 172, 175 (4th Cir. 1998), that a dramatic increase in workload does not constitute a tangible employment action. *See Enforcement Guidance*, *supra* note 156, at N:4078 n.32.

159. *See supra* notes 24–25 and accompanying text (noting the particular types of employment decisions that the legislators had in mind). Congress originally intended for the Civil Rights Act of 1964, of which Title VII was a part, to protect primarily race-based tangible employment actions. *See* HARRIMAN, *supra* note 28, at 50–52. Gender was something of an afterthought, which made its way into the statute only narrowly and after opposition by many legislators who either found it unnecessary or wanted it to be placed in a separate act. *See id.*; Meritor Savings Bank v. Vinson, 477 U.S. 57, 63–64 (1986).

160. *See* Fisk & Chemerinsky, *supra* note 14, at 762 ("Because such practices were the paradigmatic form of discrimination prior to 1964, Congress simply did not anticipate employer liability would be a big problem, and in many Title VII cases it has not been one."); *supra* notes 24–25 and accompanying text; *see also* White, *supra* note 13, at 520 ("Because Title VII ... define[s] employer to include 'any agent' of the employer, the statutes are understood to have incorporated the principle of respondeat superior.").

161. Fisk & Chemerinsky, *supra* note 14, at 762.

162. *See Ellerth*, 524 U.S. at 761.

uniformly construed Title VII to impose automatic vicarious liability when a tangible employment action occurs.[163] As the *Meritor* Court noted in 1986, "the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions."[164] In 1998, the *Ellerth* Court noted approvingly that every federal court of appeals that has addressed the issue has held that employers are vicariously liable for discriminating acts that cause tangible harms.[165]

Punitive damages were not expressly permitted under Title VII until 1991,[166] five years after the Court issued *Meritor*. To justify limiting punitive damages to the acts of agents in a "managerial capacity," the Court in *Kolstad* determined that Congress left intact *Meritor*'s suggested limits on vicarious liability when it promulgated the 1991 Act.[167] The Court asserted that these limits must therefore be observed when interpreting the Act's language.[168]

The Court's conclusion, however, is illogical. The "limits" provided by *Meritor* were stated in a very specific context—

163. *See, e.g.*, Sauers v. Salt Lake County, 1 F.3d 1122, 1127 (10th Cir. 1993) (stating that employers are strictly liable to plaintiffs who suffer economic harm as a result of a supervisor's discrimination); Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992) (explaining that liability for harassment causing economic injury is automatically imputable to the employer); Anderson v. Methodist Evangelical Hosp., Inc., 464 F.2d 723, 725 (6th Cir. 1972) (holding an employer liable under Title VII where a member of its lower management fired an employee on racial grounds); *see also* Carrillo, *supra* note 17, at 88 (noting that "employers are held vicariously liable for all discriminatory acts by a supervisor except in harassment cases"); Fisk & Chemerinsky, *supra* note 14, at 758 (stating that courts applied a strict vicarious liability standard before the recognition of harassment as a cause of action); White, *supra* note 15, at 727 (noting that strict vicarious liability had been "applied routinely"); Susan Webber Wright, *Uncertainties in the Law of Sexual Harassment*, 33 U. RICH. L. REV. 11, 17 (1999) ("In discrimination cases, courts have uniformly found an employer liable when the supervisor's discriminatory actions result in a 'tangible employment action.' ").

164. Meritor Savings Bank v. Vinson, 477 U.S. 57, 70–71 (1986).

165. *Ellerth*, 524 U.S. at 760.

166. *See Kolstad*, 119 S. Ct. at 2124 ("[T]he statute provided no authority for an award of punitive or compensatory damages."); Landgraf v. USI Film Prods., 511 U.S. 244, 252 (1994) ("Before the enactment of the 1991 Act, Title VII afforded only 'equitable' remedies. The primary form of monetary relief was back pay."); *see also* Johnson, *supra* note 3, at 527–28 (noting that the 1991 Act's compensatory and punitive damages provisions augmented the original remedial provisions of Title VII); White, *supra* note 13, at 540 (noting that "the remedial scheme originally devised for Title VII was interpreted to allow recovery of only equitable remedies for a statutory violation"); *supra* notes 4–9 and accompanying text (explaining Congress's motivations for creating the new damages provisions).

167. *See Kolstad*, 119 S. Ct. at 2128.

168. *See id.* at 2127 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 804 n.4 (1998)).

harassment causing a hostile work environment.[169] During the time of Congress's debates over the 1991 Act, courts almost unanimously held that employers were subject to strict vicarious liability for supervisory discrimination in every context except hostile work environment harassment.[170] It is unlikely, then, that Congress had the *Meritor* limits firmly in mind when structuring the 1991 punitive damages provision.[171] Moreover, *Meritor*'s guidance was brief, vague, and not definitively applied by the Court until *Ellerth* and *Faragher*, seven years after the punitive damages provision was enacted.[172] Neither the Supreme Court nor the lower federal courts had articulated the "limits on employer liability" clearly enough by 1991 to assume that Congress incorporated them into the 1991 Act.[173]

Instead, the statute should be interpreted according to its true construction. The punitive damages provision explicitly states that punitive damages are available if the "respondent" engages in the requisite type of intentional discrimination.[174] Title VII defines "respondent" to include "employer,"[175] and "employer" includes an employer's "agents."[176] These "agents" were intended to be those persons given the authority to commit the acts of discrimination contemplated by the 1964 Act.[177] The new punitive damages provisions did not change Title VII's intent to provide strict vicarious liability *at least* for the types of intentional discrimination it originally contemplated—those that are today known as "tangible."[178]

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169. *See Meritor*, 477 U.S. at 59–62, 73.

170. *See supra* notes 163–65 and accompanying text (giving examples and citing sources observing this agreement); *see also* Johnson, *supra* note 34, at 81, 86 ("At the time of the 1991 Civil Rights Act, there was no question but that employers were generally strictly liable for the acts of their supervisors.").

171. *See* Johnson, *supra* note 34, at 79 (arguing that if the employer is liable for other types of damages caused by a particular employee's discriminatory acts, Title VII's text provides no basis for not imputing the supervisor's reckless indifference to the employer); White, *supra* note 13, at 542 (explaining that "nothing in the legislative history of the 1991 Civil Rights Act suggests Congress intended an exception for vicarious liability when it comes to punitive damages").

172. *See supra* notes 53–67 and accompanying text (explaining the limits of the Court's holding in *Meritor* and the confusion among courts over its proper application).

173. *See* Fisk & Chemerinsky, *supra* note 14, at 783 ("[C]ourts imposed most of the limits on vicarious and individual liability after 1991. Thus, one honestly cannot infer much from Congress' failure to address vicarious liability.").

174. 42 U.S.C. § 1981a(b)(1) (1994) (addressing the determination of punitive damages).

175. *Id.* § 2000e(n) (1994).

176. *Id.* § 2000e(b).

177. *See supra* notes 159–62 and accompanying text (explaining the types of discrimination that the legislators originally contemplated).

178. *See supra* notes 159–62 and accompanying text; *see also supra* note 171 and

This basic notion also did not change when the Supreme Court, in *Ellerth* and *Faragher*, announced definitive standards regarding liability for harms not considered tangible. Indeed, the Court in *Ellerth* interpreted agency principles to require employer liability for tangible harms.[179] The Court announced that tangible employment actions are, for Title VII's purposes, the acts of the employer.[180] Furthermore, the Court drew the line between absolute and defensible vicarious liability at the tangible employment action: the ability of an employee to take such an action is the definitive sign that she acts as employer.[181] This rationale should apply in creating the baseline interpretation of "managerial capacity" suggested by this Note. By analogy to *Ellerth* and *Faragher*, those who take tangible employment actions have demonstrated that they act for the company; if they intentionally discriminate with "malice" or "reckless indifference," the company itself has also done so as a matter of law.

The *Ellerth* and *Faragher* decisions did not specify any limits on the types of damages for which an employer would be subject to strict vicarious liability.[182] Therefore, lower courts could reasonably assume before *Kolstad* was decided that these cases incorporated punitive damages.[183] The Fifth Circuit Court of Appeals' pre-*Kolstad* decision in *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*[184] demonstrates this assumption. The court in *Deffenbaugh* sought to determine whether the trial court had properly refused to instruct a jury on punitive damages when the plaintiff had been wrongfully fired on the basis of

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accompanying text (providing sources arguing that the 1991 Act did not intend to further limit vicarious liability).

179. *See* Burlington Industries v. Ellerth, 524 U.S. 742, 763 (1998) (stating that when an employee takes a tangible employment action against a subordinate as a result of unlawful discrimination, "it would be implausible to interpret agency principles to allow an employer to escape liability").

180. *See id.* The Court further stated that, "[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment action requires an official act of the enterprise, a company act." *Id.*

181. *See id.*

182. *See* White, *supra* note 15, at 750 (recognizing that the remedies issue "went undiscussed in *Faragher* and *Ellerth*").

183. *See, e.g., id.* (assuming that, because the Court imputed intent to harass to the employer, it also imputed punitive damage liability to the employer); Jessica Marlies, Note, Risky Business: Employers' Liability for Hostile Environment Under Title VII, 45–50 (Oct. 1998) (unpublished manuscript, on file with the *North Carolina Law Review*) (recognizing that the two cases appeared to impose absolute liability for punitive damages the same as they did for other remedies). With this assumption, Marlies argued that the Court should have bifurcated the damages analysis. *See* Marlies, *supra*, at 45–50.

184. 156 F.3d 581, 581 (5th Cir. 1998), *rev'd*, 188 F.3d 278 (5th Cir. 1999).

her race.[185] The court interpreted the tangible employment action distinction in *Ellerth* and *Faragher* to apply to all aspects of a Title VII intentional discrimination claim.[186] The court recognized that *Ellerth* and *Faragher* did not exclude punitive damages from their strict vicarious liability holdings.[187] The court then held that, because the plaintiff's supervisor took a tangible employment action against her based on race, the jury could find the employer responsible for punitive damages if the supervisor's discrimination was committed with the requisite malice or reckless indifference to the plaintiff's right to be free from discrimination.[188] Based on its interpretation of *Ellerth* and *Faragher*, the *Deffenbaugh* court required no further inquiry into the duties and responsibilities of the plaintiff's supervisor; the supervisor demonstrated ample agency through his ability to fire the plaintiff.[189]

The federal government also interpreted the *Ellerth/Faragher* holdings to incorporate punitive damages. The government's view was reflected in its oral argument before the Court as amicus curiae in *Kolstad*.[190] While the government's representative, Solicitor General Waxman, did not brief or raise the vicarious liability issue, the Justices nonetheless pressed him to discuss it, and in response he argued effectively that tangible employment actions necessitate vicarious liability for punitive damages.[191] The Solicitor General first accepted for the sake of argument that employers are vicariously liable for punitive damages only when the wrongdoers whom they employ work in a managerial capacity,[192] but then concluded that managerial capacity is demonstrated when a wrongdoer exercises her

185. *See id.* at 584–85 (involving workplace repercussions of an inter-racial relationship).

186. *See id.* at 593.

187. *See id.*

188. *See id.* at 593–94.

189. *See id.* at 593. Of course, *Kolstad*'s "managerial capacity" requirement compelled the Fifth Circuit to review this decision. The court recognized that the "tangible employment action" factor may not be as decisive in determining imputability as *Ellerth* and *Faragher* seemed to hold. *See Deffenbaugh*, 188 F.3d at 278. The court nevertheless concluded, on the basis of the wrongdoer's position and authority, that a jury could reasonably find that he was acting in a "managerial capacity" and that Wal-Mart could be liable for punitive damages based on his actions. *See id.*

190. *See* Transcript of Oral Argument at *18–19, Kolstad v. American Dental Ass'n, 119 S. Ct. 2118 (1999) (No. 98-208), *available in* 1999 U.S. TRANS LEXIS 14 (Mar. 1, 1999) (oral argument of Solicitor General Waxman for United States, as Amicus Curiae, supporting petitioner).

191. *See id.*

192. *See id.*

ability to take a tangible employment action against the victim.[193] He asserted, for example, that if a supervisor *hires or fires* someone in a malicious, intentionally discriminatory way, the jury should automatically be able to consider awarding the victim punitive damages.[194] In effect, the government asserted that any tangible employment action committed with the requisite "malice" or "reckless indifference" should permit the jury to consider awarding punitive damages.

Without either expressly espousing or rejecting the government's view as presented by the Solicitor General, the dissenters in *Kolstad* used the government's contention as a strong argument that the Court should not have addressed the vicarious liability issue in the first place.[195] Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, cautiously observed that the government considers the Restatement's "managerial capacity" principles to be incorporated into Title VII's punitive damages provision whenever tangible employment actions occur.[196] Justice Stevens then criticized the majority for disregarding the government's interpretation of its own statute, especially because the government had not been given the opportunity to brief the issue.[197]

If the Court had read a complete briefing and heard a thorough oral argument of the vicarious liability issue in *Kolstad*, it might have recognized what the Solicitor General and this Note contend: an employee who possesses and exercises an ability to take a tangible employment action against another employee demonstrates that she acts as the employer. "Managerial capacity," then, should *at least* incorporate situations in which the wrongdoer displayed this ability, and punitive damages should be, as a matter of law, imputable to the employer when this ability is exercised. Without this degree of certainty, courts may improperly remove punitive damages from juries' consideration, and the enforcement purpose of punitive damages may be undermined.

A broad interpretation of "managerial capacity" is all the more important because *Kolstad* also permits employers to escape punitive damages through their good-faith efforts.[198] This good-faith efforts

193. *See id.*
194. *See id.*
195. *See Kolstad*, 119 S. Ct. at 2133 (Stevens, J., concurring in part and dissenting in part).
196. *See id.* (Stevens, J., concurring in part and dissenting in part).
197. *See id.* (Stevens, J., concurring in part and dissenting in part).
198. *See id.* at 2128–29; *supra* notes 121–28 and accompanying text.

defense may further undermine the deterrent purposes of punitive damages by not holding employers *fully* responsible for malicious, unlawful discrimination committed by those in whom they place their authority. This part of the Note first briefly questions the Court's use of Title VII's preventive purpose as authority for creating the defense.[199] It then encourages a narrow construction of the term "good-faith efforts" so that punitive damages may remain available as a way of encouraging employers to prevent the "malice" or "reckless indifference" of their employees from unlawfully limiting employment rights.[200]

Although this Note refers to the good-faith escape from liability as a defense, the *Kolstad* Court did not state explicitly how the issue of the employer's good-faith efforts should be presented in court.[201] In remanding *Kolstad* to the court of appeals for further findings, the Court simply stated that the factfinder may need to decide if Kolstad's employer had been making good-faith efforts to prevent unlawful discrimination.[202] The Court made no suggestion that the plaintiff bears the burden of first demonstrating that the employer *was not* making good-faith efforts.[203] On the other hand, the Court did not refer to the good-faith requirement as an affirmative "defense" and thereby make it clear that the employer must prove good-faith efforts by a preponderance of the evidence.[204] Because the employer is the best source of information for its own workplace standards, this analysis assumes that the Court's "good-faith efforts" provision is intended to be an affirmative defense for the employer.[205]

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199. *See infra* notes 207–23 and accompanying text.

200. *See infra* notes 224–32 and accompanying text; *see generally* Edward L. Rubin, *Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law*, 1998 WIS. L. REV. 131 (1998) (emphasizing the roles that punitive damages can play in obtaining compliance with certain guidelines and arguing that these damages generally should be viewed not as punishment, but as analogs to administrative penalties).

201. *Kolstad*, 119 S. Ct. at 2129–30.

202. *Id.* at 2130.

203. *See id.* at 2129–30.

204. *See id.* When the Court limited vicarious liability in *Ellerth* and *Faragher* for hostile environment discrimination, it explicitly described the employer's safe harbor as an affirmative defense subject to proof by a preponderance of the evidence as required by Federal Rule of Civil Procedure 8(c). *See Faragher*, 524 U.S. 775, 807 (1998); *Ellerth*, 524 U.S. 742, 765 (1998). This careful description makes the Court's lack of clarity in *Kolstad* difficult to explain.

205. The Court of Appeals for the Fifth Circuit appears to agree, describing the provision as "the good-faith defense." *See* Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 286 (5th Cir. 1999). *But see The Supreme Court, 1998 Term—Leading Cases*, 113 HARV. L. REV. 359, 368 (1999) [hereinafter *Leading Cases*] (stating that *Kolstad* "presumably places the burden of proving that an employer did not make a good-faith effort on the plaintiff").

Regardless of whether the burden of proof is on the employer or the victim, however, liability becomes fault-based rather than vicarious. The defense consists essentially of proving the employer *itself*, within its policies and practices, did not contribute to the discrimination.[206]

Despite this procedural ambiguity, the most troubling aspect of the safe harbor provision is that the Court did not find explicit authority for it in either the text of Title VII or in common-law agency principles.[207] The punitive damages statute itself does not provide or suggest an affirmative defense based on the employer's actions,[208] and the common-law principle the Court found most relevant—the "scope of employment" provision—actually supports the imposition of strict vicarious liability.[209]

Ultimately the Court turned to Title VII's preventive purpose to justify creating the defense.[210] The Court emphasized that, while Title VII also exists to provide remedies to victims, its main goal is to prevent unlawful discrimination.[211] The Court noted that vicarious liability for punitive damages would undermine Title VII's purpose of encouraging employers to take preventive measures against discrimination.[212] Earlier in the opinion, the Court held that punitive damages are not appropriate unless the wrongdoer, knowing that such discrimination was unlawful, intentionally discriminated against the victim.[213] The Court asserted that employers might perceive this

206. *See Kolstad*, 119 S. Ct. at 2129–30.

207. *See id.* at 2128–29.

208. *See* 42 U.S.C. § 1981a(a)–(b) (1994). The Court in *Kolstad* did not actually mention the use of "agent" in the definition of "employer," but it expressly incorporated *Ellerth*'s discussion of this language and concluded from it that "[i]n express terms, Congress has directed federal courts to interpret Title VII based on agency principles." *Kolstad*, 119 S. Ct. at 2127 (quoting Burlington Indus. v. Ellerth, 524 U.S. 742, 754 (1998)). In criticizing *Ellerth*, Professors Fisk and Chemerinsky argue that Congress's use of "agent" was not a cue for courts to rigidly apply common-law agency principles to Title VII cases. They assert that "one might be forgiven for thinking that this was something less than an express, unambiguous direction to use 'traditional agency principles' to discern the proper scope of employer liability." Fisk & Chemerinsky, *supra* note 14, at 781.

209. *See Kolstad*, 119 S. Ct. at 2128; *supra* notes 122–23 and accompanying text (explaining the Court's argument that, if the common-law "scope of employment" concept were imposed directly onto Title VII, an employer's liability for punitive damages would indeed be strict); *see also* White, *supra* note 13, at 538 (stating that "common law agency principles support vicarious employer liability for discrimination").

210. *See Kolstad*, 119 S. Ct. at 2129.

211. *See id.* (citing Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975)).

212. *See id.*

213. *See id.* at 2123–24; *supra* notes 107–10 and accompanying text (explaining the Court's interpretation of the state of mind necessary to impose punitive damages).

requirement as a penalty for educating themselves and their employees about unlawful discrimination,[214] so it created a safe harbor provision based on the employer's " 'good-faith efforts to comply with Title VII.' "[215] The provision, therefore, was created to counterbalance a perceived negative effect of punitive damages liability on Title VII's preventive policy.[216]

The policy of encouraging employers to implement anti-discrimination measures, however, is not strong enough to provide the sole justification for the safe harbor. Absent the safe harbor provision, employers still have strong incentives to implement anti-discrimination measures. First, punitive damages are not an issue until there is an actionable grievance, and anti-discrimination policies and practices can eliminate much of the intentional employment discrimination that leads to such grievances.[217] Indeed, vicarious liability for punitive damages should only increase an employer's incentive to prevent incidents of discrimination.[218] Second, when an anti-discrimination effort does not prevent unlawful discrimination, it may nevertheless prevent it from being taken to court. For instance, if the policies and programs are instituted in good faith, employees may be more receptive to conciliation and less likely to sue for damages.[219] Third, if an incident of intentional discrimination reaches the litigation stage, an employer's anti-discrimination measures may still prevent it from being responsible for large monetary awards. For example, if the discrimination was in the form of hostile environment harassment, the employer's preventive policies may establish half of the affirmative defense to liability provided by *Ellerth* and

214. *See Kolstad*, 119 S. Ct. at 2129.

215. *Id.* (quoting Kolstad v. American Dental Ass'n, 139 F.3d 958, 974 (D.C. Cir.) (en banc) (Tatel, J., dissenting), *cert. granted*, 119 S. Ct. 401, *cert. denied*, 119 S. Ct. 408 (1998), *vacated*, 119 S. Ct. 2118 (1999)).

216. *See id.*

217. *See, e.g.*, ACHAMPONG, *supra* note 27, at 160–61 (explaining that many types of preventive measures can reduce occurrences of harassment); James C. Sharf, *Proceedings of the 1999 Annual Meeting, Association of American Law Schools Section on Employment Discrimination Law: Is There a Disconnect Between EEOC Law and the Workplace?*, 3 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 131, 139 (1999) (asserting that using objective employment procedures lowers employers' risk of discrimination suits and therefore "makes good business sense").

218. *See* Carrillo, *supra* note 17, at 84 (stating that vicarious liability best promotes the 1991 Act's goals by "creating the strongest incentive to establish preventive measures by employers"); *Leading Cases*, *supra* note 205, at 366 (arguing that, in itself, potential liability for punitive damages prompts employers to reduce workplace discrimination).

219. *See, e.g.*, Swallows, *supra* note 3, at 16 (noting that the early resolution of complaints reduces the chances that victimized employees will bring suit).

Faragher.[220] Finally, in any type of discrimination suit, the employer's policies and practices may prevent a court or jury from concluding that actionable discrimination occurred in the first place; the issue of damages may, therefore, never arise.[221] In sum, employers have ample reason to institute preventive policies beyond avoiding liability for punitive damages. Employers are not likely to risk bad publicity and liability for other types of damages simply to avoid punitive damage liability, especially when punitive damages are statutorily capped[222] and are available only when the discrimination was perpetrated with malice or with reckless indifference.[223]

Although it provided only dubious justification, the Court nevertheless firmly established the safe harbor provision. The Court did not, however, offer much guidance on what may be considered a " 'good-faith effort to comply with Title VII.' "[224] In formulating the protection, the Court stated only that Title VII generally encourages employers to create anti-harassment policies, grievance procedures, and education programs.[225] The Court did not indicate how employers might make these measures adequate.[226] If courts permit "good-faith efforts" to include measures that do not work effectively

220. *See supra* notes 84–85 and accompanying text (stating the requirements of the defense); *see also* ACHAMPONG, *supra* note 27, at 164 (explaining the possibility of avoiding liability for hostile environment harassment through policies permitting "prompt and adequate remedial action calculated to ending the harassment").

221. *See* Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 1, 13 (1999) (stating that the very existence of anti-discrimination mechanisms may influence courts to conclude that discrimination did not occur).

222. *See* 42 U.S.C. § 1981a(b)(3) (1994); *supra* note 6 (giving the range of these caps).

223. *See supra* note 12 and accompanying text (quoting the statutory language behind this requirement).

224. *Kolstad*, 119 S. Ct. at 2129 (quoting Kolstad v. American Dental Ass'n, 139 F.3d 958, 974 (D.C. Cir.) (en banc) (Tatel, J., dissenting), *cert. granted*, 119 S. Ct. 401, *cert. denied*, 119 S. Ct. 408 (1998), *vacated*, 119 S. Ct. 2118 (1999)); *see* Julie Brienza, *Supreme Court Makes Punitive Damages for Job Bias Harder to Get*, TRIAL, Sept. 1999, at 16, 16 (discussing the reaction to the defense by the American Trial Lawyers Association, whose representative stated that " '[t]his part of the opinion really raises more questions than it answers' "); Linda Greenhouse, *Punitive Damages Unlikely in Bias Lawsuits*, SAN DIEGO UNION-TRIB., June 23, 1999, at A10 (noting that the Court "left many important questions unanswered" and did not "define a good-faith effort"); *see also* EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1248 (10th Cir. 1999) (explaining that the punitive damages analysis is the same for the Americans with Disabilities Act as it is for Title VII, and noting that *Kolstad* did not provide a "definitive standard for determining what constitutes good-faith compliance with the antidiscrimination requirements of the ADA").

225. *See Kolstad*, 119 S. Ct. at 2129; *Wal-Mart Stores, Inc.*, 187 F.3d at 1248 (noting that anti-discrimination policies and education requirements are the only expressed factors going to good faith).

226. *See Kolstad*, 119 S. Ct. at 2129.

to eliminate discrimination, the deterrent purpose of punitive damages may be undermined. Therefore, in order to effectuate the enforcement role of punitive damages, courts should require a narrow interpretation of "good-faith efforts" and should only permit juries to consider those efforts when they are closely related to preventing the particular type of discrimination at issue.

In proving good-faith efforts, employers should be required to prove efforts they in good faith *and reasonably* expected would prevent and correct discrimination.[227] Moreover, courts should require that these efforts be narrowly tailored to prevent the *specific type and quality* of discrimination that has actually occurred in a given case.[228] For example, if, as in *Kolstad*, the intentional discrimination is based on gender, the good-faith effort should be an effort to prevent gender discrimination, not just discrimination generally. In Kolstad's case on remand, the employer should be responsible for demonstrating that its policies and practices were carefully designed to ensure that directors would not base promotion decisions on gender. Anything less specific should not shield the employer from punitive damages. However, the potential for abuse in an employer-

227. The spirit of this suggestion is reflected in a concurring opinion of a California Supreme Court justice in *White v. Ultramar, Inc.*, 981 P.2d 944, 958 (Cal. 1999) (Mosk, J., concurring). In discussing whether a punitive damages award was proper under a state statute barring retaliatory discharge, the justice considered the holding of *Kolstad*. *See id.* (Mosk, J., concurring). Justice Mosk recognized, of course, that the court was not bound by *Kolstad*'s mandates, but argued that, even under *Kolstad*, an employer should not be shielded from liability "by the expedient of a [sic] having a pro forma official policy—issued by high-level management—while conferring broad discretion in lower-level employees to implement company policy in a discriminatory . . . manner." *Id.* (Mosk, J., concurring). The justice further asserted that, "[i]t is what the company *does* . . . not just what it *says* in a stated or written policy, that matters." *Id.* (Mosk, J., concurring); *see also* Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 286 (5th Cir. 1999) (rejecting the possibility that an employer's general antidiscrimination policies could satisfy "good-faith efforts"). On remand after *Kolstad*, the Fifth Circuit Court of Appeals in *Deffenbaugh* determined that Wal-Mart did not establish a good-faith defense as a matter of law simply by encouraging employees to contact higher management with their grievances. *See id.*; *see also Punitive Damages—Employment Discrimination—"Good-Faith Effort" Defense*, 14 No. 12 FED. LITIGATOR 308, 309 (1999) (recommending, in light of the *Deffenbaugh* opinion, that employers have "specific policies in place that focus particularly on the requirements of Title VII or the ADA").

228. For example, in *Cavuoti v. New Jersey Transit Corp.*, 735 A.2d 548, 556 (N.J. 1999), the Supreme Court of New Jersey analogized the *Kolstad* "good-faith efforts" standard to a state anti-harassment statute and concluded that, in the case at hand, "good faith" required measures that were truly effective against harassment as a particular type of discrimination. *See id.* at 555–56. Also, the efforts needed to be specifically targeted at the individuals who engaged in the harassment. *See id.* at 556. The court stated that "the efficacy [of] an employer's remedial program is highly relevant to both the employee's claim against the employer and the employer's defense to liability." *Id.*

sympathetic court is stronger because the Court did not more carefully explain "good-faith efforts."

Attorneys and their corporate clients now know that a "good-faith efforts" showing can prevent punitive damage liability. In future cases, employers will be able to tailor their defenses very carefully around the "good faith" language of *Kolstad*.[229] Trial strategy targeting a broad reading of good faith may convince juries of good-faith efforts based on the quantity of measures taken to respond to discrimination generally rather than the quality of measures taken to prevent the specific type of discrimination in the case at bar.[230] At the very least, the vague safe harbor provision of *Kolstad* could shift employers' focus toward compliance tools that do more to prevent *liability* for discrimination than to prevent discrimination itself.[231] In this way, *Kolstad* has compromised one of Title VII's strongest deterrence mechanisms—punitive damages—and offered in exchange an employer incentive policy whose benefits are questionable at best.[232]

As the *Kolstad* Court explained, punitive damages are reserved only for cases where the wrongdoer intentionally discriminated on a protected basis and did so *knowing the discrimination was unlawful*.[233] Willful misconduct of this type merits special action, and the punitive damage provision can serve to enforce the protections offered by Title VII against abuse by those who would disregard those protections maliciously. Despite the limited applicability of these damages and the fact that Congress has placed strict caps on them, the Court has limited punitive damages still further. The Court has narrowed the field of employees whose behavior can be imputed to the employer and has created a very broad defense based on the employer's own actions. These limitations were not solicited by the

229. *See* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 1001–07 (1999) (explaining the evidentiary advantage possessed by employers and the ways in which defense attorneys encourage constant and meticulous documentation that would serve to exonerate employers in the event of litigation).

230. *See id.* at 1027–28 (discussing the advantage employers have in production of witnesses to testify and ample documentation of preventative measures).

231. *See* Bisom-Rapp, *supra* note 221, at 34–35 (noting that the employment law experts upon whom employers frequently rely typically gear their advice toward symbolic displays of compliance rather than substantive reductions in discrimination).

232. *See generally Leading Cases*, *supra* note 205, at 364–66 (arguing that, by limiting vicarious liability for punitive damages, *Kolstad* has undermined Congressional intent and left employers with no more incentive to prevent discrimination than they had before punitive damages were permitted).

233. *See Kolstad*, 119 S. Ct. at 2125–26; *supra* note 109 and accompanying text.

text of Title VII, nor were they necessary to promote Title VII's preventive purpose.[234] The Court nevertheless created them, and lower courts must now construe these limitations in ways that allow the punitive damages provision to continue to serve its important deterrence function.[235]

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234. *See supra* notes 134–43, 207–23 and accompanying text.
235. *See supra* notes 144–97, 224–32 and accompanying text.